

STATE OF MICHIGAN  
IN THE SUPREME COURT

SUE H. APSEY and ROBERT APSEY, JR.,

No. \_\_\_\_\_

Plaintiffs-Appellees  
and Cross-Appellants,

Court of Appeals  
Docket No. 251110

vs.

MEMORIAL HOSPITAL, d/b/a MEMORIAL  
HEALTHCARE CENTER, RUSSELL H. TOBE, D.O.,  
JAMES H. DEERING, D.O., JAMES H. DEERING,  
D.O., P.C., and SHIAWASSEE RADIOLOGY CON-  
SULTANTS, P.C.,

Shiawassee Circuit Court  
Court No. 01-007289-NH

Defendants-Appellants  
and Cross-Appellees.

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**FILED**

AUG 1 8 2005

**NOTICE OF HEARING**

CORBIN R. DAVIS  
CLERK  
MICHIGAN SUPREME COURT

**MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF  
ON BEHALF OF THE MICHIGAN CREDITORS BAR ASSOCIATION**

**AFFIDAVIT OF DAVID R. PARKER**

**BRIEF *AMICUS CURIAE* ON BEHALF OF  
THE MICHIGAN CREDITORS BAR ASSOCIATION**

**PROOF OF SERVICE**

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**NOTICE OF HEARING**

TO: ALL COUNSEL AND PARTIES OF RECORD

**PLEASE TAKE NOTICE** that the attached Motion to File *Amici Curiae* Brief shall be  
heard on Tuesday, August 30, 2005, or as soon thereafter as it may be heard.

CHARFOOS & CHRISTENSEN, P.C.

By: \_\_\_\_\_

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**MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF  
ON BEHALF OF THE MICHIGAN CREDITORS BAR ASSOCIATION**

The Michigan Creditors Bar Association ("MCBA"), by and through its co-counsel, SHERMETA, CHINKO & ADAMS, P.C., and CHARFOOS & CHRISTENSEN, P.C., hereby moves this Court for leave to file a brief as *amicus curiae* in the matter of *Apsey v Memorial Hospital, et al*, and states the following in support of its motion:

1. MCBA is a Special Purpose Bar Association recognized by the State Bar of Michigan. It is a non-profit corporation organized in 1994. It is an organization of 50 Michigan-based law firms that represent hundreds of creditors nationwide, including Target Corporation, Citigroup, Discover Bank, May Department Stores (owner of Marshall Field's and Lord & Taylor), Ford Financial and Household Finance. The member firms file thousands of lawsuits annually to collect millions of dollars of debt owed to creditors.

2. The issues in this case are important to the jurisprudence of the State, and their resolution is likely to have a direct and substantial fiscal impact on the clients served by members of MCBA.

3. This brief of *amicus curiae* is being filed at the same time as the party whose position is being espoused, that of Plaintiffs-Appellees/Cross-Appellants, in support of their cross-appeal. MCR 7.306(D).

4. As friend of the Court, and not having been previously involved in the litigation, the *amicus curiae* will be able to bring a different, and broader, perspective to the Court than the parties, which will assist the Court in deciding this matter.

**WHEREFORE**, the *amicus curiae* Michigan Creditors Bar Association requests that this Honorable Court enter an order granting *amicus curiae*'s Motion for Leave to File *Amicus Curiae* Brief, accept for filing *amicus curiae*'s Brief submitted with this Motion, and grant such additional relief as the Court deems just and equitable.

SHERMETA & ADAMS, P.C.

By: Barbara L Adams (by OP)  
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**AFFIDAVIT OF DAVID R. PARKER**

STATE OF MICHIGAN     )  
                                      ) SS.  
COUNTY OF WAYNE     )

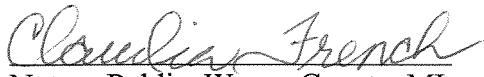
**DAVID R. PARKER**, being duly sworn, deposes and states:

1.       I am co-counsel for *amicus curiae* in the above-entitled cause of action.

2. I have read the foregoing Motion by me subscribed, and the facts set forth therein are true, to the best of my knowledge and belief.

  
\_\_\_\_\_  
DAVID R. PARKER

Subscribed and sworn to before me  
on August 16, 2005.



Notary Public, Wayne County, MI

My commission expires: 11-9-11

CLAUDINE M. FRENCH  
NOTARY PUBLIC, STATE OF MI  
COUNTY OF WAYNE  
MY COMMISSION EXPIRES 11-9-11  
ACTING IN COUNTY OF

## TABLE OF CONTENTS

### PAGE

INDEX OF AUTHORITIES .....	ii
STATEMENT OF BASIS OF JURISDICTION .....	iv
STATEMENT OF QUESTIONS PRESENTED .....	v
STATEMENT OF FACTS .....	1
DESCRIPTION OF THE <i>AMICUS CURIAE</i> .....	1
INTRODUCTION .....	1
OUT-OF-STATE AFFIDAVITS ARE ROUTINELY USED, AND VITALLY IMPORTANT, IN THE PRACTICE OF DEBT COLLECTION IN MICHIGAN, AND IN THE ENTIRE COUNTRY .....	1
THE FIRST <i>APSEY</i> OPINION .....	3
THE SECOND <i>APSEY</i> OPINION .....	4
ARGUMENT:	
I. THE COURT OF APPEALS RULINGS IN <i>APSEY I</i> AND <i>APSEY II</i> ARE BOTH INCORRECT IN HOLDING THAT MCL 600.2102 TRUMPS THE UNIFORM RECOGNITION OF ACKNOWLEDGEMENTS ACT, MCL 565.261, <i>ET SEQ</i> .....	6
A. The Statutes Should Have Been Read In Harmony, Rather Than As Conflicting, Pursuant To Controlling Rules Of Statutory Interpretation .....	6
B. Other Sources Of Law Preclude MCL 600.2102 From Being Given Preclusive Effect .....	13
II. THE MAJORITY'S DECISION IN <i>APSEY II</i> WILL HAVE A DETRIMENTAL EFFECT ON THE PRACTICE OF ENFORCEMENT OF CREDITORS' RIGHTS AND DEBT COLLECTION IN THE STATE OF MICHIGAN .....	14
CONCLUSION .....	17
PROOF OF SERVICE .....	17

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**BRIEF *AMICUS CURIAE* ON BEHALF OF  
THE MICHIGAN CREDITORS BAR ASSOCIATION**

# INDEX OF AUTHORITIES

<u>CASES:</u>	<u>PAGE</u>
<i>Antrim County Treasurer v State,</i> 263 Mich App 474; 688 NW2d 840 (2004) .....	6-7
<i>DiBenedetto v West Shore Hospital,</i> 461 Mich 394; 605 NW2d 300 (2000) .....	6
<i>City of Kalamazoo v KTS Industries, Inc,</i> 263 Mich App 23; 689 NW2d 319 (2004).....	10
<i>Donajkowski v Alpena Power Co,</i> 460 Mich 243; 596 NW2d 574 (1999) .....	10
<i>Gebhardt v O'Rourke,</i> 444 Mich 535; 510 NW2d 900 (1994) .....	4, 7
<i>House Speaker v State Administrative Bd,</i> 441 Mich 547; 495 NW2d 539 (1993) .....	7-8, 10
<i>Jennings v Southwood,</i> 446 Mich 125; 521 NW2d 230 (1994) .....	6
<i>Koontz v Ameritech Services,</i> 466 Mich 304; 645 NW2d 34 (2002).....	12
<i>Miller v State Farm Insurance,</i> 410 Mich 538; 302 NW2d 537 (1981) .....	11
<i>Moochesh v Dept of Treasury,</i> 195 Mich App 551; 492 NW2d 246 (1992) .....	12
<i>NBD Bank NA v Timberjack, Inc,</i> 208 Mich App 153; 527 NW2d 50 (1994).....	10
<i>NBD Sandusky Bank v Ritter,</i> 437 Mich 354; 471 NW2d 340 (1991) .....	10
<i>People v Switras,</i> 217 Mich App 142; 550 NW2d 842 (1996) .....	12
<i>People v Webb,</i> 458 Mich 265; 580 NW2d 884 (1998) .....	8
<i>Pohutski v City of Allen Park,</i> 465 Mich 675; 641 NW2d 219 (2002) .....	12
<i>Pittsfield Charter Twp v Washtenaw County,</i> 468 Mich 702; 664 NW2d 193 (2003) .....	8
<i>Reid v Rylander,</i> 270 Mich 263; 258 NW 630 (1935).....	11
<i>Robertson v DaimlerChrysler,</i> 465 Mich 732; 641 NW2d 567 (2002) .....	12
<i>Sipes v McGhee,</i> 316 Mich 714; 25 NW2d 638 (1947).....	11-12

**CASES:****PAGE**

<i>Struble v DAIIE</i> , 86 Mich App 245; 272 NW2d 617 (1978).....	11
<i>Wayne County Prosecutor v Dept of Corrections</i> , 451 Mich 569; 548 NW2d 900 (1996) .....	8, 10

**CONSTITUTION:**

U.S. Const, Art IV, § 1 .....	13
U.S. Const, Art IV, § 2 .....	14

**STATUTES:**

1988 PA 516.....	12
MCL 55.113 .....	9
MCL 55.307 .....	9
MCL 565.261 .....	3, 6, 16, 17
MCL 565.262 .....	4
MCL 565.262(a).....	9
MCL 565.263(4) .....	4, 5
MCL 565.268 .....	5, 8, 10
MCL 565.272 .....	4
MCL 600.2102 .....	4, 5, 6, 8, 9, 10, 11, 12, 13, 14, 16, 17
MCL 600.2145 .....	2
MCL 600.2912d .....	3, 5, 9
MCL 600.5805 .....	7
MCL 600.5838 .....	7

**COURT RULES:**

MCR 2.113 .....	13
MCR 2.116 .....	2, 3
MRE 202 .....	13
MRE 803 .....	3
MRE 902 .....	3, 15

**OTHER:**

TIAS 10072; 33 US Treaty Series (UST); 527 UN Treaty Series (UNT) 189 .....	14
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**STATEMENT OF BASIS OF JURISDICTION**

This motion and accompanying brief are being filed within the time limit under MCL 7.306(D) of the party whose position is being advocated, namely, in this case, Plaintiffs-Appellees/Cross-Appellants.

**STATEMENT OF QUESTIONS PRESENTED**

- I. DID THE COURT OF APPEALS ERR IN DETERMINING THAT MCL 600.2102 TRUMPS THE UNIFORM RECOGNITION OF ACKNOWLEDGEMENTS ACT, MCL 565.261, *ET SEQ*, INASMUCH AS THE URAA WAS ENACTED AS AN ADDITIONAL MEANS OF PROVING THE VALIDITY OF NOTARY SIGNATURES?**

Plaintiffs-Appellees answer “Yes.”

Defendants-Appellants answer “No.”

The Court of Appeals answered “No.”

*Amicus Curiae* answers “Yes.”

- II. DID THE COURT OF APPEALS ERR IN REVITALIZING AN ARCHAIC PRACTICE WHICH HAS NOT BEEN PART OF THE AFFIDAVIT PRACTICE OF LAW IN THIS STATE, IN ANY AREA OF ENDEAVOR, FOR DECADES?**

Plaintiffs-Appellees answer “Yes.”

Defendants-Appellants answer “No.”

The Court of Appeals answered “No.”

*Amicus Curiae* answers “Yes.”

## **STATEMENT OF FACTS**

*Amicus Curiae*, Michigan Creditors Bar Association, accepts the Statement of Facts asserted by Plaintiffs-Appellees/Cross-Appellants.

### **DESCRIPTION OF THE *AMICUS CURIAE***

The Michigan Creditors Bar Association is a Special Purpose Bar Association recognized by the State Bar of Michigan. It is a non-profit corporation organized in 1994. It is an organization of 50 Michigan-based law firms that represent hundreds of creditors nationwide, including Target Corporation, Citigroup, Discover Bank, May Department Stores (owner of Marshall Field's and Lord & Taylor), Ford Financial and Household Finance. The member firms file thousands of lawsuits annually to collect millions of dollars of debt owed to creditors.

### **INTRODUCTION**

The case at bar presents two opinions by the Court of Appeals which wrongly interpret the requirements placed upon one who seeks to present to a court an affidavit from an out-of-state affiant. Although the second *Apsey* opinion, discussed in more detail below, "solves the problem" as far as pending cases are concerned, it leaves an incorrect, and overly technical, expensive and time-consuming burden upon practicing lawyers, such as the members of the *amicus* group herein. More importantly, it could severely impair the ability of the clients represented by *amicus* bar association to carry out their business practices by impairing their ability to collect lawful debts owed them by Michigan residents.

**OUT-OF-STATE AFFIDAVITS ARE ROUTINELY USED, AND VITALLY IMPORTANT, IN THE PRACTICE OF DEBT COLLECTION IN MICHIGAN, AND IN THE ENTIRE COUNTRY.**

The Michigan Creditors Bar Association is an organization of 50 Michigan-based law firms that represent hundreds of creditors nationwide, including Target Corporation, Citigroup, Discover Bank, May Department Stores (owner of Marshall Field's and Lord & Taylor), Ford Financial and Household Finance. The member firms file thousands of lawsuits annually to collect millions of dollars of debt owed to creditors.

There are a number of specific procedures, outlined in more detail below, in which out-of-state affidavits are used in the furtherance of debt collection by *amicus* bar association, on behalf of creditor clients. The onerous requirement of certification, if affirmed, would have a marked impact upon the ability to continue routine debt collection legal work in Michigan, and would put Michigan at a severe disadvantage compared to other states.

First, much legal work in debt collection is done pursuant to the open account statute, MCLA 600.2145. A recitation of the pertinent parts of that statute shows that affidavit practice is at the heart of the open account statute:

In all actions brought in any of the courts of this state, to recover the amount due on an open account or upon an account stated, if the plaintiff or someone in his behalf makes an affidavit of the amount due . . . and cause a copy of said affidavit and account to be served upon the defendant . . . such affidavit shall be deemed prima facie evidence of such indebtedness. . . . If the defendant in any action gives notice . . . and annexes to such answer and notice a copy of such account, and an affidavit made by himself or by someone in his behalf, . . . such affidavit shall be deemed prima facie evidence of such counterclaim, and of plaintiff's liability thereon, unless the plaintiff, or someone in his behalf . . . makes an affidavit denying such account or some part thereof. Any affidavit in this section mentioned shall be deemed sufficient if the same is made within ten days next proceeding the issue of the writ or filing of the complaint or answer.

This statute clearly contemplates that affidavit practice is sufficient in collection of open accounts or accounts stated. It further contemplates a shortened time period, under certain circumstances, when such affidavits may be presented. A requirement that affidavits from out of state be certified would turn a streamlined, efficient process into a cumbersome, complicated process.

Second, after cases based on either breach of contract or on an open account are filed, supported by affidavits, motions for summary disposition may then follow, under MCR 2.116. However, under the Michigan Court Rules, affidavits are again required in support of said motions. MCR 2.116(G)(3). In other civil matters, depositions, admissions and other documentary evidence (as set forth in that court rule) are more frequently seen. However, in debt collection, affidavits are essential.

Finally, if the matter does not resolve on summary hearing, trial then follows. At any such trial, out-of-state affidavits are necessary, and admissible pursuant to Michigan Rule of Evidence 902(11). Specifically, this rule of evidence states that:

The original or duplicate of a record, whether domestic or foreign, of regularly conducted business activity that would be admissible under Rule 803(6), if accompanied by a written declaration under oath by its custodian or other qualified person. . .

This rule allows the creditor to file an affidavit (certificate of declaration) certifying business records and thereby avoiding unnecessary travel for court testimony. If such statement now must be certified, yet another burden is placed upon the efficient practice of debt collection—one that puts Michigan at a disadvantage compared to other states.

The only correct legal action in this case is that which removes the burden of certification of out-of-state affidavits, and allows the notarial signature to be presumptively self-authenticating. Such was intended by the Legislature, as shown by the plain language of the Uniform Recognition of Acknowledgements Act, MCL 565.261, *et seq.* Indeed, the requirement of court certification of affidavits has been all but eliminated by the national adoption of the model law.

### **THE FIRST APSEY OPINION**

In *Apsey v Memorial Hospital*, Docket No. 251110, decided April 19, 2005 (Exhibit A) (hereinafter “*Apsey I*”), Plaintiffs brought a medical malpractice suit, and, in accordance with MCLA 600.2912d, provided an affidavit of merit from an expert located in Pennsylvania. The Pennsylvania expert’s affidavit was sworn before a notary of the State of Pennsylvania. The Court of Appeals acknowledged that “Plaintiffs’ affidavit of merit bears the signature and notary seal of a Pennsylvania notary public. This status in another state carries over to this state, and the signature and title are *prima facie* evidence of authenticity, MCL 565.263(4).” (Exhibit A, at 2)

However, the Court of Appeals then went on to hold that:

“... we find that the more specific requirements of MCL 600.2102, of the Revised Judicature Act, control over the general requirements of MCL 565.272, of the Uniform Recognition of Acknowledgements Act. See *Gebhardt, supra*, at 542-543. In other words, MCL 565.262 governs notarial acts, including the execution of affidavits, in general, to which MCL 600.2102 adds a special certification requirement when the affidavit is to be read, meaning officially received and considered by the judiciary. This special certification requirement of MCL 600.2102 is not diminished or invalidated by the subsequently enacted URAA. See MCL 565.262. As such, the trial court correctly regarded the special certification as a necessary part of the affidavit submitted, and correctly dismissed the case for lack of timely submission of that certification.

(*Id.*, at 3)

### **THE SECOND APSEY OPINION**

In *Apsey v Memorial Hospital*, Docket No. 251110, on reconsideration, June 9, 2005 (Exhibit B) (hereinafter “*Apsey II*”), the Court of Appeals, by a 2-1 decision, reaffirmed “that the more specific requirements of MCL 600.2102 of the Revised Judicature Act control over the general requirements of MCL 265 of the URAA.” (*Id.*, at 5) However, the majority, basing its decision in part upon *amicus* briefs filed by several organizations, ruled that the decision would have prospective

application only (*Id.*). This meant that Plaintiff Apsey's case would be reinstated, and that the trial court order granting defendant's motion for summary disposition would be reversed, allowing plaintiff's claim to proceed in order to best serve justice and equity. The court went on to rule that:

With regard to all medical malpractice cases pending where plaintiffs are not in compliance with MCL 600.2102(4), on the basis of justice and equity, plaintiffs can come into compliance by filing the proper certification. But justice and equity also dictates a strict application from the date of this opinion. From the date of the issuance of this opinion, any affidavit of merit acknowledged by an out of state notary filed without the proper certification will not toll the statute of limitations because the legal community is now on notice.

(*Id.*, at 8)

Judge Cavanaugh filed a dissent, and would have reversed the original decision, and concluded that the affidavit of merit filed in this matter is sufficient to meet the requirements of MCL 600.2912d(1). The heart of Judge Cavanaugh's decision is as follows:

The URAA, however, explicitly states that it is "an additional method of proving notarial acts." MCL 565.268. and, MCL 565.263(4) provides that the signature and title of the notary public are prima facie evidence that he or she is a notary public and that his or her signature is genuine. That is, it is another method of proving that a notary public actually notarized the document and it does not require a clerk of a court to perform the authenticating function. The majority's reliance on and interpretation of the sentence "Nothing in this act diminishes or invalidates the recognition accorded to notarial acts by other laws of this state," found in MCL 565.268 is misguided. The key phrase in that sentence is "the recognition accorded to notarial acts." Reasonably interpreted, the sentence does not eviscerate the effect of the URAA or buttress the applicability of MCL 600.2102. That is, rather than decreasing or limiting the recognition accorded notarial acts, the URAA broadens the recognition accorded to notarial acts. The majority's reasoning also creates a double standard with respect to affidavits that will be read in judicial proceedings versus those that will not. This seems to create logistical problems in that affidavits typically have the potential of ending up in a judicial proceeding, sometimes years after the notarial act was performed, although litigation was not anticipated at the time the affidavit was notarized.

Further, contrary to the majority's claim, my interpretation of the harmonious nature of the URAA and MCL 600.2102 does not "clearly diminish the requirements of MCL 600.2102." Although it is apparent that the simple method of authentication permitted by the URAA likely makes obsolete the certification method provided by MCL 600.2102, it is still an alternative method of verifying the authenticity of notarial acts. We may not question the wisdom of a statute or inquire as to the methods of the Legislature.

(*Id.*, at Dissent, p. 2)

## ARGUMENT

### I

#### **THE COURT OF APPEALS RULINGS IN *APSEY I* AND *APSEY II* ARE BOTH INCORRECT IN HOLDING THAT MCL 600.2102 TRUMPS THE UNIFORM RECOGNITION OF ACKNOWLEDGEMENTS ACT, MCL 565.261, *ET SEQ.***

The Michigan Creditors Bar Association, as *amicus curiae*, submit this Brief to this Honorable Court so as to present solid legal reasons to persuade this Honorable Court to review the Court of Appeals rulings in *Apsey I* and *Apsey II*, and reach the correct result: that affidavits notarized in accordance with Uniform Recognition of Acknowledgements Act, MCL 565.261, *et seq.*, need not also be certified pursuant to MCL 600.2102 in order to pass muster in Michigan judicial proceedings.

#### **A. The Statutes Should Have Been Read In Harmony, Rather As Conflicting, Pursuant To Controlling Rules Of Statutory Interpretation.**

The *Apsey* opinions went astray by failing to follow principles of statutory construction in its attempt to reconcile the two statutes. The first and preeminent principle of statutory construction is that the court should not look beyond the plain language of the Act itself for interpretation of the legislature's intent, where the language of the statute is clear, unambiguous and capable of interpretation on its own terms. "We must give the words of a statute their plain and

ordinary meaning, and only where the statutory language is ambiguous may we look outside the statute to ascertain the legislature's intent." *DiBenedetto v West Shore Hospital*, 461 Mich 394, 402; 605 NW2d 300 (2000).

The most crucial misstep in both *Apsey* opinions is found at p. 3 of *Apsey I*. The opinion correctly notes that statutes having a common purpose must be read in harmony in order to further that purpose. *Jennings v Southwood*, 446 Mich 125, 136-37; 521 NW2d 230 (1994); *Antrim County Treasurer v State*, 263 Mich App 474, 481; 688 NW2d 840 (2004). However, the opinion then makes the mistake of citing *Gebhardt v O'Rourke*, 444 Mich 535, 542-43; 510 NW2d 900 (1994), for the proposition that "when a specific statutory provision differs from a general one, the specific one controls."

In order to apply the *Gebhardt* rule of statutory construction, there must first be a conflict between the specific and the general provisions of the statutory scheme. For instance, in *Gebhardt* itself, the two statutes in question were MCL 600.5838, and MCL 600.5805, which both set forth definitions of when a cause of action accrues. Section 5805 would have allowed the plaintiff to bring his legal malpractice action within two years of the final judgment of acquittal, one of the prerequisites to showing that legal malpractice occurred. Under this view, plaintiff's claim was timely—as found by the Court of Appeals in its opinion, at 195 Mich App 506; 491 NW2d 249 (1992). Under § 5838, however, as found to be controlling by this Court, legal malpractice actions had to have been brought two years from the last date of professional service, regardless of when the plaintiff discovers or otherwise has knowledge of the claim. Because plaintiff discovered the malpractice claim several years before the final judgment of acquittal was entered, and because the attorney defendant in *Gebhardt* ceased providing professional services much earlier as well, under 5838, as found by this Court, plaintiff's claim was not timely.

The point in *Gebhardt* is that it there could not be two definitions setting forth at which point the statute of limitations began to run; it had to have been one or the other. This is the difference between the *Gebhardt* case and the instant one. This is why the *Gebhardt* ruling has no place in the instant one. In this case, it can be both—and in fact, the Legislature has specifically chosen that it is to be both, as set forth in the plain language of the URAA.

A court faced with potentially conflicting statutes must “endeavor to read them harmoniously and to give both statutes a reasonable effect.” *House Speaker v State Administrative Bd*, 441 Mich 547, 568; 495 NW2d 539 (1993); *People v Webb*, 458 Mich 265, 273-274; 580 NW2d 884 (1998); *Wayne County Prosecutor v Dept of Corrections*, 451 Mich 569, 577; 548 NW2d 900 (1996) (“When this Court can construe statutes, claimed to be in conflict, harmoniously, it must do so. . . .”) Thus, the court’s first responsibility in this case was to find a basis for construing § 2102 and the URAA in a consistent manner. The Court of Appeals failed to do so in *Apsey I*.

The *Apsey II* majority continued along this path of error by citing only the third sentence of 565.268: “Nothing in this Act diminishes or invalidates the recognition accorded to notarial acts by other laws of this State.” In point of fact, in order to harmonize URAA with 600.2102, the second sentence actually controls: “This Act provides an additional method of proving notarial acts.” Because there is no provision in 600.2102 clearly establishing that it is to be the exclusive method of proving notarial acts, the sections can be read in harmony by allowing either to be done.

*Amicus* believes that this settles the issue in its entirety. The plain language of 565.268 clearly states that, for those choosing to do so, the requirements of MCL 600.2102 can continue to be met. However, in a clear exercise of its authority, the legislature enacted a second statute to provide an additional means of proving notarial acts. Those who choose the second method are not to be punished, despite the clear language of 565.268, by failing to comport with 600.2102. Otherwise, the word “additional” in the statute becomes nugatory and must be read out of the statute in order to

harmonize it with the older statute, § 2102. This, of course, cannot be done, without running afoul of another fundamental rule of statutory construction, that every word of a statute must be given meaning. *Pittsfield Charter Twp v Washtenaw County*, 468 Mich 702; 664 NW2d 193 (2003).

Thus, it was not appropriate to resort to selective rules of construction governing situations where statutes are in conflict, such as giving the terms of a specific statute priority over a more general statute, or interpreting a statute based upon editorial decisions of its placement in the compiled laws, where the statutes can be harmonized. The *Apsey* opinions reached the incorrect conclusion as a direct result of their erroneous assumption of conflict between the statutes.

The opinions also omitted other language of the URAA incompatible with the conclusion reached in the opinion. For instance, at p. 3 of the *Apsey I* opinion, the opinion employs ellipses in quoting MCL 565.262(a). The full sentence reads as follows:

For the purposes of this Act, “notarial acts” means acts which the laws of this State authorize notary publics of this state to perform, including the administering of oaths and affirmations, taking proof of execution and acknowledgement of instruments, and attesting documents. Notarial acts may be performed outside this State for use in this State with the same effect as if performed by a notary public of this State by the following persons authorized pursuant to the laws and regulations of other governments in addition to any other person authorized by the laws of this State. [Types of people omitted.]

Thus, “notarial acts” are specifically defined as including the taking of oaths and executions—precisely what is involved in attesting to an affidavit—and that all-important sentence affirming that notarial acts may be performed outside this State “for use in this State with the same effect as if performed by a notary public of this State.” The full sentence shows that the URAA was enacted for the same specific purpose as § 2102 with respect to the judicial reception and recognition of an affidavit notarized outside of Michigan. The *Apsey II* majority finding that § 2102 took priority over the URAA on this basis, because it referred specifically to the use of affidavit for this purpose, is

contradicted by the clear fact that the URAA is no less specific in declaring that any out-of-state notarial act is to be “used” in this State, without limitation—and using an affidavit in a judicial proceeding is one of the principal uses of such notarial acts—just the same as a notarial act in Michigan would be. As an affidavit of merit executed before a Michigan notary public need not be certified to be “used” by a plaintiff to comply with MCL 600.2912d, *see* former MCL 55.113, now MCL 55.307, the URAA specifically directs that an affidavit of merit sworn before an out-of-state notary also be “used” for this purpose without certification.

The *Apsey II* majority also failed to give appropriate deference to the fact that the URAA was a later enacted statute, intended to establish a uniform scheme to occupy an entire field. The statute is to be interpreted as such. Consistently, in interpreting the Uniform Commercial Code, this Court has understood that such is to be liberally construed and applied to promote the Code’s underlying purposes and policies, one of which is to promote consistency among the various states and to further coherence in the business law of the entire nation. *NBD Sandusky Bank v Ritter*, 437 Mich 354, 360; 471 NW2d 340 (1991); *NBD Bank NA v Timberjack, Inc.*, 208 Mich App 153, 156-57; 527 NW2d 50 (1994).

The *Apsey II* majority further stated that “the legislature is charged with knowledge of existing laws on the same subject and is presumed to have considered the effect of new laws on all existing laws.” (Exhibit B, at 3.) Yet that is exactly what the legislature did in enacting the uniform act, and in specifically including sentence 2 of MCL 565.268 to the effect that “this Act provides an additional method of proving notarial acts.” It was error to interpret the URAA and 600.2102 as being in conflict, while ignoring the import of that sentence.

An existing statute may be held to be impliedly repealed in two instances: “(1) when it is clear that a subsequent legislative act conflicts with a prior act, or (2) when a subsequent act of the legislature clearly is intended to occupy the entire field covered by a prior enactment.” *House*

*Speaker, supra*, at 563; *Donajkowski v Alpena Power Co*, 460 Mich 243, 253; 596 NW2d 574 (1999); *Wayne County Prosecutor, supra*, at 576; *City of Kalamazoo v KTS Industries, Inc*, 263 Mich App 23, 36-37; 689 NW2d 319 (2004)

Both prongs apply. The URAA is the more recently-enacted statute. *City of Kalamazoo, supra*. Further, the Commissioners, in their Prefatory Note, indicated that prior statutes need not be repealed, precisely because the URAA was “in addition to” those previous provisions (Exhibit C). Michigan courts have recognized that where the Legislature adopts a uniform act, the Commissioners’ commentary accompanying that uniform act is entitled to considerable weight in assessing the intent of the Michigan legislature. *See, Miller v State Farm Insurance*, 410 Mich 538, 557-560; 302 NW2d 537 (1981); *Struble v DAIIE*, 86 Mich App 245, 251-252; 272 NW2d 617 (1978).

In other words, the Legislature clearly intended that other means, preexisting enactment of the URAA, of proving notarial acts, were to be allowed to continue. However, the Legislature clearly did not intend to enact a statute, while at the same time rendering one of its means of proving a notarial act invalid *ab initio*. Such a strained interpretation cannot be permitted to stand.

Thus, the *Apsey II* majority incorrectly disregarded the full legislative and judicial history of the two Acts involved, in finding them to be in conflict, rather than capable of being harmonized. Of course, 600.2102 hails from a century when the authority of notaries to take oaths was not firmly established in every state or territory (those territories at the time being all those places west of the Mississippi), and when Michigan courts deemed themselves unable to take judicial notice of the laws of other states. The URAA, in contrast, evolved from a series of earlier 20<sup>th</sup> century enactments recognizing that such local restrictions and parochial prejudices regarding notarial acts stifled commerce and transactions between persons in different jurisdictions.

Undue emphasis was also placed upon location of the URAA in our compiled laws in a chapter relating to property transfers rendered it ineffectual to trump the “evidentiary” scope of 600.2102. The *Apsey II* majority failed to acknowledge that earlier Supreme Court cases holding that predecessor enactments to the URAA did, in fact, have the effect of negating the certification requirements of this “evidentiary” Act. *See, e.g., Reid v Rylander*, 270 Mich 263, 268; 258 NW 630 (1935); *Sipes v McGhee*, 316 Mich 614, 621; 25 NW2d 638 (1947), *rev’d on other grounds, Shelley v Kreman*, 334 US 1 (1948); with respect to out-of-state notarized documents filed in judicial proceedings.

Because the Michigan Legislature voted to approve the *text* of the URAA, not its placement in the Michigan Compiled Laws, the conclusion that the placement of the uniform act could limit the reach of the statute is completely erroneous. Such was previously recognized this fact in *People v Switras*, 217 Mich App 142, 146; 550 NW2d 842 (1996), when it ruled that “the legislature has not delegated to . . . the compiler [of Michigan laws] the power to affect the application and reach of any statute.” *See also, Moochesh v Dept of Treasury*, 195 Mich App 551, 567; 492 NW2d 246 (1992) (“That the compilers of the law have placed a portion of 1988 PA 516 in the tax code and another portion in the lottery regulations is not dispositive.”)

Relying on the position of the URAA, instead of its text, violates perhaps the most fundamental principle of statutory interpretation. In recent years, this Court has repeatedly emphasized a rigorously textual approach to interpretation of statutes, and has admonished that where the *text* of a statute is unambiguous, “judicial construction is not permitted and the statute must be enforced as written.” *Robertson v DaimlerChrysler*, 465 Mich 732, 748; 641 NW2d 567 (2002). Thus, this Court has stressed that “courts simply lack the authority to venture beyond the unambiguous *text* of a statute.” *Koontz v Ameritech Services*, 466 Mich 304, 312; 645 NW2d 34 (2002) (emphasis added). Similarly, this Court has held that “courts may not speculate about an

about an unstated [legislative] purpose where the unambiguous *text* plainly reflects the intent of the legislature.” *Pohutski v City of Allen Park*, 465 Mich 675, 683; 641 NW2d 219 (2002) (emphasis added).

The fact that the URAA is located as it is in our compiled laws makes it no less a statute pertaining to evidence than § 2102. Again, we refer the Court to Section 8, and its plain statement that this Act is intended to provide an additional method of “proving” a notarial act. There are numerous statutes throughout Michigan’s compiled laws that pertain to evidentiary matters not found huddled in Chapter 21 of the RJA.

**B. Other Sources Of Law Preclude MCL 600.2102 From Being Given Preclusive Effect.**

The *Apsey II* majority further erred in not looking beyond the statutes for guidance. The panel identified § 2102 as serving as a rule of evidence because it is located in the “evidence” chapter of the RJA. Having so discerned this fact, the panel did not give any consideration to what effect today’s court rules and the promulgated Michigan Rules of Evidence might have upon this pre-Civil War statutory rule of evidence. Under MCR 2.113, for example, all that is required of an affidavit is that it be “verified by oath or affirmation.” There is no requirement in our court rules or rules of evidence that this verification itself be certified. Under MRE 202, the courts may take judicial notice of the statutes of other states, such as those authorizing a notary public to take an oath and those making the title and signature of the notary presumptive or *prima facie* evidence of that authority and the genuineness of the signature. Michigan’s Rules of Evidence provide alternative methods of authenticating the acts of officials of other states performed in their official capacity and not requiring any certification of such acts. *See*, MRE 902.

executed in another state in a judicial proceeding than that applied to an affidavit executed before a notary in Michigan. In so doing, § 2102 runs afoul of the full faith and credit clause of the U.S. Constitution, Art IV, § 1, for the certification clause means that Michigan courts will not give full faith and credit to the laws of other states authorizing notaries public to take affidavits that are valid under the laws of those states without such certification. Indeed, § 2102 is also in contravention of the Hague Convention Treaty, at least the part of it devoted to the process of certification of notary signatures. TIAS 10072; 33 US Treaty Series (UST) 883; 527 UN Treaty Series (UNT) 189. This treaty mandates that each country honor any other country's process for certification of a notary signature (known as an apostille). No individual state, such as Michigan, can enforce laws which are in direct violation of a federal treaty. This statute also raises issues under the privileges and immunities clause, Art IV, § 2, for it undeniably discriminates against non-residence notaries public, whose acts must be certified to be received in a Michigan court, and in favor of resident notaries not subject to this same restriction. Clearly, one of the avowed purposes of the URAA is to avoid these constitutional perils by placing notarial acts performed outside of Michigan on the same footing as notarial acts performed within this State.

## II

### **THE MAJORITY'S DECISION IN *APSEY II* WILL HAVE A DETRIMENTAL EFFECT ON THE PRACTICE OF ENFORCEMENT OF CREDITORS' RIGHTS AND DEBT COLLECTION IN THE STATE OF MICHIGAN.**

If the *Apsey II* opinion stands, the Michigan statutory scheme will require that out-of-state affidavits, that is, those affidavits notarized outside of Michigan, must first be certified by an out-of-state county clerk where the affidavit was taken, in order to be received in judicial proceedings outside of Michigan. Although the *Apsey II* majority attempted to limit the holding to

affidavits of merit in medical malpractice cases, MCL 600.2102 has no such limitation. If MCL 600.2102 governs, any out-of-state affidavit in Michigan, submitted for the purpose of judicial proceedings, would apply to cases for collection of debts owed to companies that operate in Michigan, but are based out of state. Indeed, some debtor attorneys have already raised this defense to collection cases currently pending in Michigan courts.

As noted in the introduction, the *amicus* MCBA represents hundreds of creditors nationwide, who, given the nature of business and commerce currently existing in this State, and in this country, regularly are required to go to court to collect money owed to them by debtors within the State of Michigan. Michigan judicial debt collection practice, prior to the *Apsey* opinion, was a streamlined, efficient procedure, relying principally upon the use of affidavits from knowledgeable agents and employees of the out-of-state creditors. Whether the case is brought on open account, or whether it is brought as a breach of contract, the appropriate agent or employee of the out-of-state clients would sign an affidavit in support of the legitimacy of the debt and the claim, and the appropriate amount that was owed. Member attorneys of *amicus* MCBA would then attach these affidavits to pleadings when filing a lawsuit, when filing a motion for summary disposition and, where necessary, at trial under MRE 902(11). Given the sheer number of non-paying debtors, forcing creditors to obtain out-of-state certification would work an extreme hardship on the efficient practice of debt collection in Michigan.

Each certification costs money and takes additional time, which will create unnecessary delay and increase the expense of litigation to collect debt. Further, many collection centers of the corporate clients are in South Dakota, Delaware and Ohio. These states, and many others, no longer have statutory authority for “certification” as required under *Apsey II* and 600.2102. Bluntly put, county clerks do not certify affidavits in these, and many other, states. The unfortunate upshot

would be that certain out-of-state creditors would be technically unable to present evidence in support of a just claim involving an unpaid debt by the happenstance of the state in which they were located.

Even where proper certification could be obtained, the streamlined procedure of the open account statute, the efficiencies of summary judgment practice and the trial that result therefrom will be more costly and more time-consuming, where affidavits would be required to be certified under *Apsey II*, or worse, in certain circumstances, affidavits would be unavailable, as the sort of certification contemplated by MCL 600.2102 and *Apsey II* would not be available.

This ruling puts Michigan at a disadvantage in the global economy. Banks, retailers, hospitals and other creditors will incur unnecessary delay and expense trying to obtain certification for affidavits for suit, summary disposition and trial. Since many states do not even have a statutory mechanism for certifying affidavits, at least not in accordance with the literal dictates of MCL 600.2102, it is conceivable that some collection lawsuits might be barred entirely.

Many of these creditors are retailers who pay state sales tax. This ruling will frustrate collection of their debt and reduce their bottom line sales. Accordingly, although its impact was first felt in medical malpractice cases, *Apsey* is, at its heart, an “anti-business” ruling. It negatively affects debt collection lawsuits. In a credit-based economy, this is bad business for Michigan.

That is why the Legislature, to bring Michigan in line with the rest of the country, adopted the URAA, MCL 565.261, *et seq.* This Court must give full effect to the plain language of this statute, as enacted by the Legislature, so that Michigan may rejoin the rest of the country, and the rest of the world, in conducting interstate and international business.

### CONCLUSION

Based upon the foregoing arguments and authorities, the *amicus curiae* Michigan Creditors Bar Association respectfully requests that this Honorable Court grant the relief sought by Cross-Appellant, that this Honorable Court reverse *Apsey II*, and instead hold that the provisions of MCLA 600.2102 are not the sole means of proving the authenticity of an out-of-state notarized affidavit, but instead are co-existent with the means of proving authenticity of out-of-state affidavits set out in the Uniform Recognition of Acknowledgement Act, MCLA 565.261, *et seq.*

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### PROOF OF SERVICE

I certify that on August 17, 2005, a copy of the foregoing Motion for Leave to File Brief *Amicus Curiae* Brief, Affidavit of David R. Parker, Notice of Hearing and Brief *Amicus Curiae* on behalf of The Michigan Creditors Bar Association was served upon all attorneys of record in the above-entitled cause of action, at their business locations as disclosed by the pleadings of record herein, via the following:

☒ U.S. Mail                      ☐ Hand Delivery  
☐ Facsimile                      ☐ Overnight Mail

I declare under penalty of perjury that the above statement is true to the best of my knowledge, information and belief.

